[illegible]

[illegible] of the United States

[illegible]

BANK ONE, CHICAGO, N.A.,

Petitioner,

v.

MIDWEST BANK & TRUST COMPANY,

Respondent.

[illegible] OF CERTIORARI
[illegible] COURT OF APPEALS
[illegible] CIRCUIT

BRIEF FOR THE RESPONDENT

[illegible]

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[illegible] 1995

[illegible]

QUESTION PRESENTED

Whether section 611 of the Expedited Funds Availability Act (12 U.S.C. § 4010) grants the Federal District Court subject matter jurisdiction over a check collection dispute between two Illinois banking corporations?

PARTIES TO THE PROCEEDINGS AND RULE 29.1 STATEMENT[1]

Petitioner, Bank One, Chicago, N.A. and respondent, Midwest Bank & Trust Company are the only parties to this proceeding. Both petitioner and respondent are Illinois banking corporations. Petitioner formerly was known as First Illinois Bank & Trust.

Respondent is a wholly owned subsidiary of First Midwest Corporation, a Delaware Corporation.

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[1] Respondent did not "consent" to the filing of *amicus curiae* briefs by the New York Clearing House Association and the Electronic Check Clearing House Organization. In both instances respondent asked what question of law or fact the brief would present that was relevant to the disposition of this case and would not be presented by petitioner or the Solicitor General. In neither instance did it appear that the filing of such a brief would be favored under Rule 37.1 of this Court.

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STATEMENT

A. The Check Clearing Process, the Uniform Commercial Code, and the Expedited Funds Availability Act.

When a customer deposits a check in a bank, that bank sends the check for payment by the bank on which the check is drawn. The bank at which the check is deposited is referred to as the "depository" or "receiving" bank, and the bank on which the check is drawn is referred to as the "payor" or "originating" bank. See 810 ILCS 5/4-105(2) and (3); 12 U.S.C. § 4001(17) and (20). Often the depository bank forwards the check for collection through the Federal Reserve System, an intermediary bank, or a private check clearing house association. When the check is presented to the payor bank, that bank either pays the check or returns the checks unpaid to the depository bank.

Prior to the enactment of the Expedited Funds Availability Act, check collection disputes such as the present case were decided under state law. More particularly, they were governed by Articles 3 and 4 of the Uniform Commercial Code ("UCC"). Federal regulations regarding the check collection process existed such as Regulation J (12 C.F.R. Pt. 210), but those federal regulations did not create a federal cause of action. Under the express terms of Section 4-103(a) and (b) of the UCC (810 ILCS 5/4-103(a) and (b)), those federal regulations are

incorporated into the UCC and become enforceable as a matter of state law.[2]

In 1987 Congress enacted the Expedited Funds Availability Act ("EFA Act") in response to complaints by banking customers that banks were placing unreasonably long holds on deposited funds. That Act is Title VI of the Competitive Equality Banking Act of 1987, Pub. L. No. 100-86, 101 Stat. 635, and is codified at 12 U.S.C. §§ 4001-4010.

Section 611 of the EFA Act (12 U.S.C. § 4010) concerns civil liability. The focus of the case at bar concerns whether this section confers federal jurisdiction over interbank disputes.[3] Respondent disagrees with petitioner's characterization of the subsections in section 611 of the Act. Respondent's position regarding these statutory provisions is set forth in the Argument section of this brief.

The EFA Act authorizes the Board of Governors of the Federal Reserve System ("Federal Reserve Board" or "Board") to prescribe regulations. The Board has prescribed regulation CC (12 C.F.R. Pt. 229).

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[2] *See, e.g., United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990) where the Court applied 12 C.F.R. through UCC § 4-103 *Id.* 784 S.W. 2d at 908 n.4.

[3] The EFA Act uses the terms "depository institutions." Like petitioner, respondent sometimes uses the term "bank" as synonymous with the EFA's term "depository institutions".

B. The Facts In This Case

Petitioner and respondent are both Illinois banks that use the Federal Reserve Bank of Chicago as their clearing house for collection of checks. (Stip. ¶¶ 1-3).[4] On September 25, 1991, one of petitioner's customers deposited $77,371.84 in its account. Included in that amount was a check drawn on respondent in the amount of $64,294.27. (Stip. ¶ 30). At the close of business on September 25, 1991, the account of petitioner's customer showed a balance of $78,598.14 of which $1,377.30 represented collected funds and $77,262.84 represented uncollected funds. (Stip. ¶ 34).

The check at issue was received by respondent on September 26, 1991. The endorsement did not meet respondent's standards and petitioner's proof stamp (endorsement) on the check was so faint it was illegible. (Stip. ¶¶ 14, 15).

Because respondent first received the check on Thursday, September 26, 1991, under 12 C.F.R. 229.33 respondent had until 4:00 p.m. on Monday, September 30, 1991 to notify the forwarding bank that it had determined not to pay the check. During the period September 26, 1991 through September 30, 1991, petitioner allowed $55,577.90 to be paid out or withdrawn against uncollected funds. $42,651.33 of that amount was never collected. (See Stip. ¶¶ 33-36). This $42,651.33 is included in the $43,912.06 amount claimed by petitioner.

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[4] Stip refers to the "STIPULATIONS AS TO UNCONTESTED FACTS" which is record item number 35.

C. Course of Proceedings Below

On February 28, 1992 petitioner filed suit in the Circuit Court of Cook County, Illinois alleging violations of the Uniform Commercial Code and Regulation CC. The Court granted the motion to strike that complaint for failure to satisfy the pleading requirements of Illinois law, and granted petitioner leave to file an amended complaint. Rather than filing an amended complaint, petitioner voluntarily dismissed its state court action and refiled the suit in the Federal District Court (N.D. Ill.) (*See*, Record Item 8 pp. 2-3 and exhibits 1-3 attached to it). The District Court denied a motion to dismiss and subsequently granted petitioner's motion for summary judgment. Pet. App. 5a.

During oral argument the Court of Appeals raised *sua sponte* the question of federal subject matter jurisdiction. After the submission of supplemental statements by the parties, the Court vacated the judgment against respondent and remanded the case to the District Court with instructions to dismiss for lack of jurisdiction.

Petitioner filed a petition for rehearing *en banc*. The Federal Reserve Board filed an *amicus curiae* brief in support of the petition, as did the New York Clearing House Association and Standard Bank and Trust Company. The Court of Appeals denied the petition but amended its opinion. The Court of Appeal's opinion as amended is set forth at J.A. 7-J.A. 9.

SUMMARY OF ARGUMENT

1. This case involves the question of whether section 611 of the EFA Act confers federal district court jurisdiction over a check collection dispute between two Illinois banks. The statute which petitioner claims to grant jurisdiction must be strictly construed with precision and fidelity to its language.

Petitioner's argument is based on the erroneous assertion that subsections 611(a) and 611(f) of the EFA Act are parallel provisions, with the former creating a new federal cause of action against banks by any person other than another bank, and the latter creating the same cause of action between banks.

Petitioner's position is refuted by the text of the statute. The language and structure of subsection 611(a) is unlike that of subsection 611(f). Subsection 611(a) grants any person other than another bank the right to bring an action against a bank for violation of the EFA Act and regulations prescribed pursuant to it. Subsection 611(f) does not grant anyone a right to bring an action. Rather, it grants the Federal Reserve Board the authority to impose on banks or allocate among banks the risks of loss and liability. Subsection 611(a) grants a right to a party. Subsection 611(f) confers decision making authority on the Board. Because there is no provision in section 611 of the EFA Act that creates a cause of action for interbank disputes, that statute does not confer federal jurisdiction.

2. The Federal Reserve Board's view as to whether the EFA Act confers federal court jurisdiction is not entitled to deference. The Board's lack of an administrative

mechanism to adjudicate certain claims cannot create federal court jurisdiction over them. While some deference may be given to the Board's view as to its own adjudicatory authority, the issue of whether the statute confers federal court jurisdiction over interbank disputes is not one in which deference to the Board's construction is appropriate.

3. The Conference Report indicates that EFA Act subsection 611(f) grants the Board the power to resolve interbank disputes administratively. The legislative history does not support petitioner's claim that subsection 611(f) grants banks a cause of action.

4. Subsection 611(f) of the EFA Act does not grant a bank a cause of action. For the same reason that it is insufficient to invoke federal jurisdiction under section 611, it cannot be a basis for obtaining jurisdiction under 28 U.S.C. § 1331.

5. The Uniform Commercial Code expressly incorporates all federal regulations applicable to banks. (UCC § 4-103). Thus, the state courts have provided, and continue to provide, a forum for adjudicating interbank disputes in accordance with the federal regulations.

If a person other than a bank brings an EFA Act claim in federal court, 28 U.S.C. § 1367 allows supplemental jurisdiction over any related claim. Thus, EFA Act claims can still be decided in a single proceeding.

6. The Court of Appeals decision does not conflict with *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989). Lack of an administrative mechanism for resolving interbank EFA Act disputes cannot confer federal

court jurisdiction. The issue in this case is not whether the Board may adjudicate the interbank dispute between petitioner and respondent. The issue is whether the EFA Act confers jurisdiction on the federal district court to decide this dispute.

Unlike the FSLIC in *Coit*, the Board does not have a financial interest that would be affected by its decision. Furthermore, the language of the statute involved in *Coit* is very different from the statutory language involved in the present case.

7. The issue before this Court is not what Congress should have done. The issue is what did Congress do. The public policy arguments asserted by petitioner and *amici curiae* should be directed to Congress rather than this Court.

ARGUMENT

I.

THE STATUTORY LANGUAGE OF THE EFA ACT PRECLUDES FEDERAL COURT JURISDICTION

The sole issue before this Court is whether section 611 of the Expedited Funds Availability Act (12 U.S.C. § 4010) grants the federal district court subject matter jurisdiction over a check collection dispute between two Illinois banks. Prior to that Act, such disputes were considered state law disputes that were governed by the Uniform Commercial Code.[5] Recognizing that federal

[5] Under section 4-103 of the Uniform Commercial Code, any Federal regulations such as Regulation CC (12 C.F.R. Pt.

courts have jurisdiction only to the extent it is conferred by Article III of the Constitution or Statutes enacted by Congress (*Kokkonen v. Guardian Life Insurance Co. of America*, 114 S. Ct. 1673, 1675 (1994)), petitioner and the *amicus curiae* supporting it argue that section 611 of the EFA Act confers such jurisdiction.

The statutory provisions in section 611 of the EFA Act which petitioner claims to confer federal jurisdiction must be construed "with precision and with fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). "[S]tatutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction." *Boelens v. Redman Homes, Inc.*, 748 F.2d 1058, 1067 (5th Cir. 1984); *Romero v. International Terminal Operating Co.*, 358, 379-380 (1959). *Also see Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100, 108-109 (1941); *Finley v. United States*, 490 U.S. 545, 552-553 (1989).

The arguments of petitioner and the United States as *amicus curiae* are based upon the erroneous assertion that subsections 611(a) and 611(f) of the EFA Act are parallel provisions, with 611(a) creating a new federal cause of action against banks by any person other than another bank, and subsection 611(f) creating the same cause of action between banks. (See Petitioner's Br. pp. 5, 14; *Amicus Curiae* Br. For United States p. 6). Their contention that subsection 611(d) confers federal jurisdiction is based upon their erroneous claim that subsection 611(f)

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229) the regulations relied upon by petitioner, or Regulation J (12 C.F.R. Pt. 210) are incorporated into the state law. 810 ILCS 5/4-103(a) and (b).

grants to banks a new federal cause of action against banks which is similar to the cause of action that subsection 611(a) grants to persons other than banks.

Petitioner's position fails to adhere to the "precision and . . . fidelity to the terms by which Congress has expressed its wishes." *Cheng Fan Kwok v. INS*, 392 U.S. 206, 212 (1968). The terms by which Congress expressed its wishes in subsection 611(a) differ substantially from those in subsection 611(f).

As in all cases involving construction of a statute, the starting point is the language of the statute itself. *E.g., Reiter v. Sonotone Corp.*, 442 U.S. 330, 337 (1979); *Bread Political Action Committee v. Federal Election Committee*, 455 U.S. 577, 580 (1982). Subsection 611(a) of the EFA Act provides:

> **(a) Civil Liability**
>
> Except as otherwise provided in this section any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to the sum of –
>
> (1) any actual damage sustained by such person as a result of the failure;
>
> (2)(A) in the case of an individual action, such additional amount as the Court may allow, except that the liability under this subparagraph shall not be less than $100 nor greater than $1,000; or
>
> (B) in the case of a class action, such amount as the court may allow, except that –

(i) as to each member of the class, no minimum recovery shall be applicable; and (ii) the total recovery under this subparagraph in any class action or series of class actions arising out of the same failure to comply by the same depository institution shall not be more than the lesser of $500,000 or 1 percent of the net worth of the depository institution involved; and

(3) in the case of any successful action to enforce the foregoing liability, the costs of the action, together with a reasonable attorney's fee as determined by the court.

Subsection 611(f) of the EFA Act provides:

(f) Authority to establish rules regarding losses and liability among depository institutions.

The Board is authorized to impose on or allocate among depository institutions the risks of loss and liability in connection with any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks. Liability under this subsection shall not exceed the amount of the check giving rise to the loss or liability, and, where there is bad faith, other damages, if any, suffered as a proximate consequence of any act or omission giving rise to the loss or liability.

Even a cursory comparison of those two subsections discloses that they are very different. Subsection 611(a) grants to persons other than depository institutions a right to sue for violations of the EFA Act and regulations prescribed under it. Subsection 611(f) does not grant banks a right to sue, but grants the Federal Reserve Board

the power to impose on or allocate among banks the risks of loss and liability.

Subsection 611(a) was modeled on 15 U.S.C. § 1640(a), the civil liability section in the Federal Truth in Lending Act. *See* S. Rep. No. 19, 100th Congr. 1st. Sess. 70 (1987). Subsection 611(a) authorizes "any person *other than another depository institution*" to bring a civil action against any depository institution which fails to comply with the EFA Act or any regulation prescribed under the EFA Act. 12 U.S.C. § 4010(a) (emphasis added).

The language and the structure of subsection 611(f) is unlike that of subsection 611(a).[6] Contrary to the statement at page 14 of Petitioner's Brief, subsections 611(a) and 611(f) do not both create liability. Subsection 611(a) provides that "any depository institution which fails to comply with any requirement imposed under this chapter or any regulation prescribed under this chapter with respect to any person other than another depository institution is liable to such person in an amount equal to. . . ." In contradistinction, subsection 611(f) does not provide that a depository institution is liable to another depository institution. Rather, it authorizes The Board of Governors of the Federal Reserve System "to impose on or allocate among depository institutions the risks of loss

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[6] Unlike subsection 611(a), subsection 611(f) is not modeled on the Truth in Lending Act. (15 U.S.C. § 1640(a)). Although respondent does not know of a specific Act on which § 611(f) is modeled, it should be noted that the limitations on damages in § 611(f) are based on section 4-103(c) of the UCC 810 ILCS 5/4-103(c). *See Amicus Curiae* Br. For United States pp. 14-15 n.9.

and liability in connection with any aspect of the payment system. . . . " This language grants the Board of Governors the power to decide whether a bank is liable. It is very different from subsection 611(a)'s language which grants to any person other than a bank a cause of action in which a federal court will decide whether a bank is liable.

A statute must be read as a whole, and the meaning of language depends on context. *King v. St. Vincent's Hospital*, 502 U.S. 215, 221 (1991). Thus, the textual difference between subsections 611(a) and 611(f) are significant. *Id.* When Congress modeled EFA Act § 611(a) on the Truth in Lending Act (15 U.S.C. § 1640(a)), Congress knew that the language it used would create a federal cause of action. *See Tower v. Moss*, 625 F.2d 1161 (5th Cir. 1980). Indeed, it shows that Congress knew how to create a federal cause of action when that was the intent. *See King v. St. Vincent's Hospital* 502 U.S. 215, 221 n.9. The fact that Congress used very different language and structure in subsection 611(f) shows that Congress did not intend subsection 611(f) to create the same type of cause of action as subsection 611(a) creates. When Congress uses particular language in one section of a statute and uses different language and structure in another section, there is a presumption that Congress has acted intentionally and did not intend both sections to grant the same type of right. *See Russello v. United States*, 464 U.S. 16, 23 (1983); *International Organization of Masters Mates & Pilots v. Brown*, 498 U.S. 466, 475-476 (1991); *also see Palmore v. United States*, 411 U.S. 389, 395 (1973).

The text of EFA Act subsection 611(f) provides that "[t]he Board is authorized to impose on or allocate among

depository institutions the risk of loss and liability. . . . " Petitioner argues that this text indicates that Congress contemplated that the Board would exercise this authority by rule-making, even though "rules" or "regulations" are not mentioned in the text of subsection 611(f). (Petitioner's Brief p. 14). Petitioner contends that the text of the statute is clear (Petitioner's Brief p. 15), but also argues that the title of subsection 611(f) resolves the ambiguity in the text (*Id.* at 14).

Although the text in subsection 611(f) does not refer to authority to prescribe rules or regulations, the title to that subsection does. Titles of statutory sections may not be used to change the plain meaning of the statutory text. *Brotherhood of Railroad Trainman v. Baltimore & O.R.R.*, 331 U.S. 519, 528-529 (1947). They may, however, be used as an aid to resolve an ambiguity. *FTC v. Mandel Brothers, Inc.*, 359 U.S. 385, 388-389 (1959).

In this case the plain language of subsection 611(f) only authorizes the Board to exercise the adjudicatory function of imposing or allocating the risk of loss or liability. If, however, subsection 611(f) authorizes the Board to prescribe regulations, then the only subsection in section 611 that creates a civil cause of action for violation of such regulations is subsection 611(a). That subsection expressly does not authorize actions by another depository institution.

II.

THE FEDERAL RESERVE BOARD'S VIEW AS TO WHETHER THE EFA ACT CONFERS FEDERAL COURT JURISDICTION IS NOT ENTITLED TO DEFERENCE

The Board construes section 611(f) of the EFA Act as not conferring on it any authority to adjudicate interbank claims under the EFA Act or regulations prescribed pursuant to the Act. The Court of Appeals' decision does not require the Board to exercise such authority. The Court of Appeals correctly holds that the Board's view that it lacks such authority and/or its failure to exercise such authority cannot confer subject matter jurisdiction on the federal courts. (*See* J.A. 9).

Although some deference may be given to the Board's view as to its own adjudicatory authority, the issue of whether section 611 of the EFA Act confers federal court jurisdiction over interbank check collection disputes is not one in which deference to the Board's construction is appropriate. In *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446-447 (1987) the Court held that the issue before it was a pure question of statutory construction for the Courts to decide. The Court rejected the claim that deference should be given to the construction urged by INS. Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984), the Court explained:

> "The judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent [citing cases.] If a Court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."

INS v. Cardoza-Fonseca, 480 U.S. at 446-447.

Commodity Futures Trading Comm'n v. Schor, 478 U.S. 833 (1986) is inapposite to the case at bar. *Schor* involved the question of whether the commission could entertain certain types of counterclaims in reparation proceedings. In deferring to the commission's interpretation of the statute as to the commission's jurisdiction, the Court placed great emphasis on the fact that Congress had ratified that administrative construction. *See id.* 478 U.S. at 845-846.

Petitioner's reliance on *Reiter v. Cooper*, 113 S. Ct. 1213 (1993) is also misplaced. In *Reiter* there was no question about the fact that federal subject matter jurisdiction existed. The question was whether exhaustion of administrative remedies was required before proceeding to the courts. The Court held the exhaustion doctrine to be inapplicable because the Interstate Commerce Commission ("ICC") had construed its statute as giving it no power to provide any administrative remedies. Although the Court gave deference to the ICC's construction, that construction did not seek to regulate the scope of federal court jurisdiction conferred by the statute. *See id.* 113 S. Ct. at 1220-1221.

In the present case the Board has taken the position that section 611 of the EFA Act does not grant it authority to administratively adjudicate interbank check disputes, and such disputes may only be adjudicated by the courts.

If the Board's view were correct, under *Adams Fruit Co., Inc. v. Barrett*, 494 U.S. 638 (1990), no deference should be given to the Board's view as to whether a bank may invoke federal rather than state court jurisdiction under the EFA Act. *Adams Fruit Co., Inc. v. Barrett* involved a private right of action granted by the Migrant and Seasonal Agricultural Worker Protection Act ("AWPA"). The Court held that the Secretary of Labor was not the adjudicator of such claims, and the Secretary's view as to the scope of judicial power was not entitled to any deference. The Court stated:

> Moreover, even if AWPA's language establishing a private right action is ambiguous, *we need not defer to the Secretary of Labor's view of the scope of § 1854 because Congress has expressly established the Judiciary and not the Department of Labor as the adjudicator of private rights of action arising under the statute. A precondition to deference under Chevron is a congressional delegation of administrative authority.* . . . No such delegation regarding AWPA's enforcement provisions is evident in the statute. Rather, Congress established an enforcement scheme independent of the Executive and provided aggrieved farmworkers with direct recourse to federal court where their rights under the statute are violated. Under such circumstances, it would be inappropriate to consult executive interpretations of § 1854 to resolve ambiguities surrounding the scope of AWPA's judicially enforceable remedy.

Congress clearly envisioned, indeed expressly mandated, a role for the Department of Labor in administering the statute by requiring the Secretary to promulgate standards implementing AWPA's motor vehicle provisions. § 1841(d).

> *This delegation, however, does not empower the Secretary to regulate the scope of the judicial power vested by the statute. Although agency determinations within the scope of delegated authority are entitled to deference, it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction.*

494 U.S. at 649-650 (citations omitted, emphasis added).

In the present case, because the Board asserts that it has no adjudicatory authority over EFA Act interbank disputes, its position is similar to that of the Secretary of Labor in *Adams Fruit Co. v. Barrett, supra*. The judicial power is outside the scope of the Board's authority. Therefore, the Board's view as to whether the EFA Act grants federal court jurisdiction is not entitled to any deference. *Also see Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986).

III.

THE LEGISLATIVE HISTORY FURTHER CONFIRMS THAT THE EFA ACT DOES NOT CONFER FEDERAL COURT JURISDICTION OVER INTERBANK DISPUTES

The Legislative history of the EFA Act further confirms the correctness of the holding of the Court of Appeals. The Conference Report states in pertinent part:

> Subsection (f) of section 611 authorizes the Federal Reserve to establish liability among depository institutions for violation of the regulations or failure to meet the standards imposed by the regulations promulgated under section 609. It permits the Federal Reserve to allocate the risks of loss and liability in connection with

> any aspect of the payment system, including the receipt, payment, collection, or clearing of checks, and any related function of the payment system with respect to checks.
>
> For example, under this subsection, the Federal Reserve may allocate or impose liability on depository institutions for risks of losses incurred by other depository institutions, their accountholders, or other owners or holders of a check due to a depository institution's failure to handle the check in accordance with regulations imposed under Section 609.

H.R. Conf. Rep. No. 261, 100th Cong. 1st. Sess. 183 (1987). This statement indicates that subsection 611(f) grants the Board the power to resolve interbank EFA Act disputes administratively.

The legislative history does not support petitioner's claim that Congress intended to confer federal court jurisdiction over interbank disputes. Petitioner argues that as originally passed by the House and Senate, the language of subsection 611(a) was broad enough to authorize interbank actions. Petitioner's position is based upon: (a) the fact that the original bill did not expressly limit its grant of a cause of action to any person other than another depository institution; and (b) the assumption that Congress intended the term "person" to include depository institutions.

A word appearing in several places in an act is generally read the same way each time it appears. *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994). Section 610(c)(2) (12 U.S.C § 4009(c)(2)) seems clearly to be using the term "person" in a way that does not include a depository

institution within that term. Thus, it is far from clear that the early versions of the bills would have authorized interbank causes of action. The version which was enacted (excluding actions by depository institutions) may simply be a clarification of the intent of the earlier draft.

In any event, the version which Congress enacted expressly excludes interbank actions from the cause of action it grants. When there is a change of a provision in a bill in the conference committee, it strongly militates against a judgment that Congress intended a result it had declined to enact. *See Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 200 (1974).

IV.

28 U.S.C. § 1331 DOES NOT CONFER JURISDICTION IN THIS CASE

Petitioner and *amici curiae* contend that if EFA Act section 611 does not confer jurisdiction, 28 U.S.C. § 1331 does. Initially, it should be noted that this argument is beyond the scope of the question before this Court. The sole question is whether section 611 of the EFA Act grants federal court jurisdiction in this case.

Petitioner's argument is based on an incorrect reading of subsection 611(f) of the EFA Act. Petitioner states: "Subsection (f) creates an interbank cause of action by providing for [l]iability under this subsection in the amount of the check giving rise to the loss or liability, . . . " Subsection 611(f) does not create liability for any amount. Rather, it authorizes the Board to impose on or allocate among banks the risks of loss and liability

and, except in cases of "bad faith", limits the amount that the Board may impose or allocate to the amount of the check giving rise to the loss or liability.

Proceeding from the incorrect premise that subsection 611(f) creates an interbank cause of action, petitioner claims that 28 U.S.C § 1331 grants jurisdiction over that cause of action. For the same reason that subsection 611(f) does not create a cause of action for purposes of subsection 611(d), it also does not create a cause of action for purposes of 28 U.S.C. § 1331.

V.

THE COURT OF APPEALS DECISION DOES NOT DENY BANKS A JUDICIAL FORUM FOR EFA ACT INTERBANK DISPUTES

A.

Federal Reserve Regulations Are Incorporated Into The Uniform Commercial Code And Enforceable In State Courts

Regulation CC (12 C.F.R. Pt. 229) is incorporated into the Uniform Commercial Code ("UCC") by UCC section 4-103 (810 ILCS 5/4-103). Section 4-103(a) of the UCC provides that: "[t]he effect of the provisions of this article may be varied by agreement. . . . " UCC section 4-103(b) provides: "Federal Reserve Regulations and operating circulars, clearing house rules, and the like have the effect of agreements under subsection (a), whether or not specifically asserted to by all parties interested in items handled." Subsection (c) provides that: "action or non-action . . . pursuant to Federal Reserve Regulations or operating circulars is the exercise of ordinary care. . . . "

In *Appliance Buyers Credit Corp. v. Prospect National Bank*, 505 F. Supp. 163, 164 (C.D. Ill. 1981) *aff'd* 708 F.2d 290 (7th Cir. 1983) the Court held that by its own terms the UCC is modified by Federal Reserve Regulations. Therefore, under state law, in interbank disputes such as the present case, the rights and duties of the banks are governed by the Federal Reserve Regulations. *See United Postal Savings Association v. Royal Bank Mid-County*, 784 S.W. 2d 906 (Mo. Ct. App. 1990) where the Court applied 12 C.F.R. Pt. 210 through UCC § 4-103. *Id.* 784 S.W. 2d at 908 n.4; *Union National Bank of Little Rock v. Metropolitan National Bank*, 265 Ark. 340, 578 S.W. 2d 220, 223 (Sup. Ct. Ark. In Banc 1979); *Marquette National Bank v. Heritage Pullman Bank & Trust Co.*, 109 Ill. App. 3d 532, 534-535, 440 N.E. 2d 1033, 1035-1036 (1st Dist. 1982).

B.

DENIAL OF FEDERAL JURISDICTION ON INTERBANK CLAIMS WILL NOT RESULT IN MULTIPLE OR FRAGMENTED ADJUDICATION

The Federal Reserve Board has declined to exercise adjudicatory authority over interbank disputes. Therefore, the only forum available to adjudicate them is the courts. If a person other than a depository institution brings an EFA Act claim in the federal courts against a bank, and the bank has a third party claim against another bank which arises out of the same transaction, the federal courts now have jurisdiction to decide both claims in a single proceeding. This jurisdiction to resolve the entire controversy is conferred by the supplemental jurisdiction statute (28 U.S.C. § 1367(a)) which became

effective December 1, 1990.[7] The predictions by petitioner and *amici curiae* of multiple proceedings, fragmented claims and judicial inefficiency are simply incorrect.

VI.

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH *COIT V. FSLIC*

The Court of Appeals' decision states that disputes such as the present case are to be handled administratively before the Federal Reserve Board or in the state courts. Petitioner and the United States argue that the portion of that statement which refers to administrative proceedings before the Board places the Court of Appeals' decision in conflict with this Court's decision in *Coit Independence Joint Venture v. FSLIC*, 489 U.S. 561 (1989).

First it must be pointed out that even if the Board does not have an administrative mechanism for resolving interbank EFA Act disputes, lack of such an mechanism cannot confer federal court jurisdiction over them. Moreover, *Coit* is inapposite to the present case. In *Coit* a state court suit was filed by Coit against FirstSouth, a federal savings and loan association. FirstSouth was declared insolvent and FSLIC was appointed as receiver; FSLIC substituted itself in the *Coit* lawsuit, and removed the case to federal court. Thus, FSLIC stood in the shoes of

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[7] *Finley v. United States*, 490 U.S. 545 (1989) raised doubts about the availability of pendent party jurisdiction, but invited Congress to enact legislation on this subject. *Id.* 490 U.S. at 556. Congress responded by enacting 28 U.S.C. § 1367. *See* H.R. Rep. No. 734, 101st Cong. 2nd Sess. 28 (1990).

FirstSouth and was defending Coit's claim. The Court held that FSLIC's statutory power to settle and compromise a claim against it is distinguishable and inconsistent with a power to adjudicate that claim. *Id.* 489 U.S. at 573.[8]

Unlike *Coit*, in the present case the Federal Reserve Board does not have a stake in the outcome of the dispute between petitioner and respondent. Furthermore, the statutory language in *Coit* authorizing FSLIC "to settle, compromise, or release claims in favor of or against the insured institution" (489 U.S. at 573) is very different from the EFA Act's language authorizing the Federal Reserve Board "to impose on or allocate among depository institutions the risks of loss and liability. . . . "

The issue before this Court is not whether the Board may adjudicate the interbank dispute between petitioner and respondent. The issue is whether the EFA Act confers on the federal district court jurisdiction to decide this dispute.

VII.

POLICY CONSIDERATIONS CANNOT GOVERN THE READING OF THE STATUTE

Petitioner and the *amicus curiae* briefs argue that public policy considerations justify the granting of federal court jurisdiction over interbank check collection

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[8] 12 U.S.C. § 1821(d)(6)(A) was enacted in response to this Court's decision in *Coit Independence Joint Venture v. FSLIC, supra*. It provides administrative procedures for determining contested claims. *See* H.R. Rep. No. 54(I) 101st Cong. 1st Sess. 86, 214-215 (1989); *Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 881-882 (5th Cir. 1992).

disputes. Petitioner, the United States, and the New York Clearing House argue that unless this Court holds that the EFA Act grants federal court jurisdiction, there will not be an adequate forum to decide EFA Act disputes. As discussed in Section V. of this brief, the Court of Appeals decision does not have the dire consequences they predict.

More importantly, the public policy arguments advanced by petitioner and in two of the *amicus curiae* briefs misperceive the issue before this Court. The issue is not what Congress should have done. The issue is what did Congress do. These policy considerations should be addressed to Congress, not the Court. They cannot govern the reading of the language in the statute *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344-345 (1979); *also see Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361, 374-375 (1986).

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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